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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDYNE ADELE PERRY,

Defendant and Appellant.

2d Crim. No. B170287
(Super. Ct. No. PA042963)
(Los Angeles County)

Claudyne A. Perry appeals from the judgment entered after a jury found her guilty of assault with a deadly weapon by means of force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)). The jury also found true the allegation that Perry personally inflicted bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). Imposition of sentence was suspended, and Perry was placed on probation with the condition that she serve 180 days in jail. She contends her conviction must be reversed for instructional error, and that a \$200 parole revocation fine imposed pursuant to section 1202.45 must be stricken. We order the fine stricken, and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On the night of November 19, 2002, Perry paged her boyfriend, Adrian

¹ Statutory references are to the Penal Code, unless otherwise noted.

Cedrick Lathan, and arranged to meet him at a car wash in Mission Hills. When Lathan did not respond to Perry's page, she drove to the car wash to look for him. While she was at the car wash, she saw Lathan's car parked at a nearby motel. Perry went to the motel and discovered that Lathan was there with Sharon Thomas. Perry and Lathan briefly spoke while Thomas sat in her car. Perry then returned to her car and parked approximately 10 feet behind Thomas's car. Perry walked up to Thomas's car and asked Lathan if he was romantically involved with Thomas. After Lathan told Perry to "get the fuck out of here," she returned to her car. As Lathan was standing at the rear of Thomas's car, Perry accelerated and pinned him between the two vehicles. According to Thomas, Perry honked her horn and drove away while gesturing with her middle finger. Lathan suffered a serious leg injury as a result of the collision.

Perry denied that she had deliberately parked behind Thomas's car. She testified that she had returned to her car after Lathan had grabbed her by the arm and hair. She also testified that Thomas had threatened to punch her in the chest, which frightened her because she had recently undergone bypass surgery. She claimed that she had intended to go in reverse and drive away when the accident occurred, and that she did not know she had hit Lathan. She also denied honking her horn and gesturing with her middle finger.

DISCUSSION

Instructional Error

At the prosecution's request, the trial court instructed the jury that "[a] 'deadly weapon' includes the use of an automobile, for purposes of Penal Code Section 245(a)(1)." Perry contends that this instruction improperly relieved the prosecution of its burden to prove an essential element of her crime of conviction, i.e., that she used a deadly weapon to assault Lathan. Although she did not object to the instruction below, she claims the error can be raised for the first time on appeal because it affects her substantial rights. (§ 1259.) The People respond that the alleged error is waived because the instruction did not affect Perry's substantial rights, as contemplated by section 1259, and that in any event the claim lacks merit.

"Instructions regarding the elements of the crime affect the substantial rights of the defendant [as contemplated by section 1259], thus requiring no objection for appellate review. [Citations.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) On the merits, however, Perry's claim fails. In reviewing claims of instructional error, we must view the instructions as a whole to determine whether it is reasonably likely that the jury applied the challenged instruction in a way that violated the defendant's constitutional rights. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013; CALJIC No. 1.01.)

Viewing the instructions as a whole, we conclude there is no error. Although the instruction establishes that a car is included in section 245's definition of a deadly weapon, the jury was also instructed that Perry could not be found guilty of committing assault with a deadly weapon pursuant to that section unless she used the car "in such a manner as to be capable of producing, and likely to produce, death or great bodily injury. . . ." (CALJIC No. 9.02.) The jury was further instructed that such use had to be willful in order to qualify as a violation of section 245, subdivision (a)(1), and that in using her car in that manner Perry had to be "aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person" (CALJIC No. 9.00 (2002 rev.).) Because the instructions as a whole do not demonstrate a reasonable likelihood that the jury interpreted the challenged instruction in a manner that relieved the prosecution of its burden to prove that Perry used her car as a deadly weapon, it was not error to give the instruction.

Parole Revocation Fine

Perry also contends, and the People concede, that the \$200 parole revocation fine imposed pursuant to section 1202.45 must be stricken because imposition of a state prison term was suspended and she was placed on probation. (See *People v. Hannah* (1999) 73 Cal.App.4th 270, 274-275 [recognizing that parole revocation fines cannot be imposed pursuant to section 1202.45 where the defendant is placed on probation and there are no terms of parole]; see also *People v. Tye* (2000) 83 Cal.App.4th 1398, 1401, fn. omitted [recognizing that "[t]he conclusion reached by the *Hannah* court

makes sense when probation is granted upon suspension of *imposition* of sentence, for in that situation the defendant has not been sentenced to a prison term"].) Accordingly, we shall order that the fine be stricken. We note, however, that Perry will be subject to a fine under section 1202.45 in the future if her probation is revoked and a sentence is imposed. (*People v. Andrade* (2002) 100 Cal.App.4th 351, 357-358.)

The parole restitution fine imposed pursuant to section 1202.45 is ordered stricken. As so modified, the judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Meredith C. Taylor, Judge
Superior Court County of Los Angeles

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Defendant and Appellant.

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